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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1076 of 1980

And

Cross Objection therein.

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

NURUNISSA D/O. GULAM RASUL

Appearance:

Ms.Harsha Devani, learned AGP for Appellants

MR GIRISH D BHATT for Respondents

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 28/07/2000

ORAL JUDGEMENT

This is defendants' Appeal against the judgment and decree passed by the City Civil Court at Ahmedabad (Court No.15) in Civil Suit No.2125/76 on 28.4.80 whereby the plaintiffs' Suit was decreed and it was declared that

the plaintiffs had the right of way to 10 ft. wide passage on the Government land and the defendants had no right whatsoever to close the aforesaid passage on the Government land or to obstruct or prevent the plaintiffs in their use of the said 10 ft. wide passage on the Government land. It was further declared that the defendants had no right to raise any construction in or on the Government land as would obstruct the plaintiffs in their use of the aforesaid 10 ft. wide passage. A permanent injunction was issued to the defendants restraining their agents and/or servants from making construction in or on the Government land in such a manner as would obstruct the plaintiffs in their use of the aforesaid 10 ft. wide passage on the Government land or reduce the width of the aforesaid 10 ft. wide passage on the Government land to less than 10 ft.

2. The plaintiffs had filed the Suit for a declaration that they had a right of way in the land situated in S.No.5482 in Raikhad Ward of Ahmedabad and that the defendants have no right to close such right of way or to obstruct or prevent the plaintiffs from enjoyment of such right of way to make any construction so as to obstruct the plaintiffs in enjoyment of such right of way of theirs in respect of the Government land and for a permanent injunction restraining the defendants from making or raising any construction so as to obstruct the plaintiffs right of way in any manner on the Government land.

3. It was pleaded on behalf of the plaintiffs that plaintiff No.1 was the owner of a property bearing S.No.5477 situated in Raikhad, Ahmedabad, she had a right of way over the Government land for ingress to the aforesaid property, plaintiff No.1 had no other way for the purpose of entry, Plaintiff No.2 is also owner of the property bearing S.No.5551 situated in the same area. The Government land is situated towards the west and also towards the north of property of plaintiff No.2 bearing S.No.5551. The Government land was allotted to the Police Department wherein the Police Department has constructed staff quarters for the police force after leaving a large area as open space. The plaintiffs and members of their family had a right of way over the Government land and the plaintiffs right of way over the Government land had also been mentioned in the Survey Records after holding an inquiry by the City Survey Officer in this regard. The plaintiffs and members of their family had been using this right of way over the Government land at all times and for all occasions, including those arising from a joyous or sorrowful event

in their families. The plaintiffs had no other way except the one over the Government land. On 22.4.79 the plaintiffs came to know that the defendants were trying to obstruct or raise a compound wall around the Government land in such a way that the plaintiffs right of way is closed and only two-three feet wide strip is left open. That in case the defendants are allowed to succeed in their design, the plaintiffs would be put to great difficulties, particularly on the occasion of taking out funeral procession in the case of such a sorrowful event in their families. That the defendants had no right to abolish or close the plaintiffs' right of way or to obstruct the plaintiffs in any manner. The plaintiffs filed a Civil Suit No.1280 of 1976 on the same cause of action and for similar reliefs and obtained an ad interim injunction. The aforesaid Suit was filed without notice under S.80 C.P.C. and, therefore, the same was likely to fail for want of statutory notice under S.80 C.P.C. and, therefore, the plaintiffs withdrew the said Suit on 5.7.76 with the permission to file fresh Suit in the same subject matter and on the same cause of action. The plaintiffs had served the required statutory notice under S.80 C.P.C. dated 24.4.76, which was received by the defendants on 26.4.76 and, thereafter, the present Suit was filed for reliefs and declarations, etc. as aforesaid.

4. The defendants through their Written Statement Exh.7 resisted the Suit on various grounds including the ground that the Suit was misconceived and not tenable at law, that the plaintiffs had no legal right over Government land for free access on which the construction was being put up, that sufficient land has been kept open for the purposes of passage and movement, that the plaintiffs are not entitled to claim the reliefs prayed for by them in the Suit and that the plaintiffs had no cause of action for filing the present Suit. On these grounds, the Suit was sought to be dismissed.

5. On the basis of the pleadings of the parties, the following issues were struck:-

1. Do the plaintiffs prove that they have right of way over the suit land?
2. Do the plaintiffs prove that the defendants are not entitled to block their right of way by means of construction on the suit land?
3. What relief or reliefs, if any, are the plaintiffs entitled to claim in this Suit?
4. What final order and decree?

All these issues have been found to be in favour of the plaintiffs. The plaintiffs examined plaintiff No.2 at Exh.33, plaintiff No.1 at Exh.34. Maherunissa Kadri at Exh.35 and Aziz-ul-Rehman Mohemdisa at Exh.46 in support of their case. The defendants examined Ashok Nebhandas Harvani at Exh.41 in support of their case. The parties brought on record several documents including the extract from Property Register in respect of the properties involved in the Suit as also Sanads pertaining to certain properties, which have bearing on the subject matter of the Suit. On appreciation of the evidence, on the basis of the material and documents, the Court found that the plaintiffs had a right of way. So far as the question of right of way is concerned, there cannot be any dispute that the right of way has to be given and in the given case such right of way was already in existence at the time when the suit was filed and the same was being used as a way for number of years in past and to this limited aspect as to whether the plaintiffs had a right of way or not, it cannot be said that merely because the right of way is on the Government land, the individuals like plaintiffs had no right of way or access to their places.

6. However, the question still remains as to the extent of this right of way and as to whether the plaintiffs claim was sustainable. According to the plaintiffs, the passage on the Government land should be about 15 ft. wide and it may not be only 4 to 5 ft. wide if the Government land is allowed to be surrounded by the proposed compound wall. It was not in dispute even by defendants that 5 ft. wide passage on the Government land has to be there and it would be left open even after the compound wall is constructed around the Government land. However, it was submitted on behalf of the plaintiffs that they have been using their right of way on this land for times immemorial and such right of way would necessarily include the way or the passage on the Government land for marriage processions or funeral processions, as the case may be. It appears that the decision of keeping of 10 ft. wide passage was taken in view of the representation made by people in that area, presumably keeping in mind their customary processions. The defendants were not able to show the circumstances requiring them to reduce 10 ft.wide passage to 5 ft. wide passage. However, on the basis of the material and the evidence, the trial court came to the conclusion that the defendants had agreed to keep 10 ft. wide passage on the Government land towards its south-east boundary. The defendants did not lead any evidence to show that there exist or existed any justifiable reason for reducing the

width of passage from 10 to 5 ft. or even less than that. The right of way on the servient property would carry with it its reasonable access. On the basis of the reasoning, as aforesaid, the trial court came to the conclusion that both the issues i.e. issue Nos.1 and 2 have to be answered in affirmation and the same have been answered accordingly.

7. I have gone through the findings recorded by the trial court in the impugned judgment, particularly in Para 8 of the said Judgment. So far as the right of way is concerned, the same is not in dispute. The only question is as to whether the width of this way should be 5 ft. or 10 ft. or 15 ft. While the plaintiffs have claimed that it should be 15 ft., the say of the defendants was that even 5 ft. wide way was sufficient to meet the requirements. However, it was proved that this was the way for the purpose of carrying the funeral processions in case of death and this was the only way for other happy occasions and in case the way is reduced to 5 ft. only, it would not be a case of effective exercise of such right of way. It would mean a great hardship, inconvenience and congestion to all concerned and such right of way could be exercised by the plaintiffs without adversely affecting the requirements of quarters or residence therein and, therefore, the construction of the compound wall could not be made in a manner so as to reduce the width of this way to 5 ft. only. The trial court found that 10 ft. wide passage was required and it appears to be a correct finding and on that basis, if the plaintiffs' Suit has been decreed for 10 ft. wide way, the same is not required to be disturbed in this Appeal, more particularly when no material has been brought on record, rather in the facts and circumstances of this case, it has been correctly found that the requirement of 10 ft. wide way was minimum. The judgment and decree passed by the trial court in this case granting right of 10 ft. wide way is not required to be disturbed and this Appeal, therefore, fails and the same is hereby dismissed.

8. On behalf of the plaintiffs, a Cross Objection has also been filed claiming the right of way for 15 ft. instead of 10 ft. The plaintiffs have failed to show that 10 ft. wide way would not be sufficient to meet their requirements and the learned counsel on behalf of the Cross Objectors has failed to point out any material so as to show that 15 ft. wide way could be claimed by them as a matter of right on the Government land. The right of way has to be given, but it cannot be insisted that it must be wide to the extent of 15 ft. The width

of 10 ft. is even sufficient for a vehicle of a reasonable size and dimension so as to meet the minimum requirements of the residents therein. I, therefore, do not find that there is any substance in the grievance raised through Cross Objection filed by the plaintiffs.

9. In the result, the Appeal as well as the Cross Objection fail. Both are hereby dismissed. In the facts and circumstances of the case, no order as to costs.

(M.R.Callan,J)